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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HERBERT M. COLLINS, *et al.*,
Petitioners,

v.

CITY OF NORFOLK, VIRGINIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. RESPONDENTS' ARGUMENT IN SUPPORT OF THE DECISION BELOW THAT THE RULE 52(a) "CLEARLY ERRONEOUS" STANDARD APPLIES TO RULINGS ON QUESTIONS OF LAW AS WELL AS TO FINDINGS OF FACT CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT.

Even the most recent decisions of this Court maintain the historic distinction between the standard of appellate review governing trial courts' rulings on questions of law and trial courts' findings of fact. Rulings of law are subject to independent, plenary legal review by the appellate court and may reversed if they are in error; findings of

fact may not be set aside unless they are "clearly erroneous" within the meaning of Rule 52(a), which requires deference to the factual determinations of the trial court. *Anderson* v. *City of Bessemer*, 84 L.Ed.2d 518, 529 (1985); *Bose* v. *Consumer's Union*, 466 U.S. 485, 498 (1984); *Inwood Laboratories* v. *Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); see, 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 52.03[2] (1985); C. Wright & A. Miller, Federal Practice and Procedure, Civil § 2588, at 750 (1971).

Respondents, in attempting to defend the Fourth Circuit's decision in this case, argue that this distinction should be ignored in cases brought pursuant to the 1982 amendment to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and rely on Section 2's "totality of the circumstances" standard, this Court's decisions in *Rogers* v. *Lodge*, 458 U.S. 613 (1982), and *White* v. *Regester*, 412 U.S. 755 (1973), and the Fifth Circuit's decision in *Velasquez* v. *City of Abilene*, 725 F.2d 1017 (5th Cir. 1984). Brief in Opposition, pp. 9-13. The argument is untenable and merely serves to underscore the necessity of granting review of the decision below.

There is nothing in the statutory language itself or in the legislative history of the statute which supports such a contention. Rather, the congressional purpose behind the statute shows just the opposite. In enacting Section 2, Congress decided to eliminate any requirement of proving discriminatory intent because of the frequently subjective nature of such a determination and because the intent standard "has created confusion as to the proof necessary to establish a violation." H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 28-29 (1981); S. Rep. No. 97-417, 97th Cong., 2d Sess. 36-37 (1982). Instead, Congress thought it preferable that the impact of a challenged voting practice should be assessed on the basis of "objective factors," S. Rep. No. 97-417, *supra*, at 27; H.R. Rep. No. 97-227,

supra, at 30, and provided a suggestive listing of such factors in the Senate report (pp. 28-29). Thus, contrary to respondents' argument, the legislative history of the statute shows that Congress was concerned that a determination of a statutory violation should not be left to the unfettered discretion of the trial courts, creating the danger of conflicting rulings on the same or similar proof, but rather should be based on "objective factors" which had been employed in prior cases to show whether or not the challenged practice denies minorities an equal opportunity to elect candidates of their choice.

Whether or not the trial court has properly defined these "objective factors" and has properly applied them to the facts of the case presents purely legal questions or, at most, mixed questions of law and fact, which should be subject to plenary review on appeal. Sweeping all of the trial court's rulings on these legal issues under the rubric of "findings of facts", thus denying appellants plenary review of the trial court's legal rulings, seriously undermines the congressional goals of objectivity and consistency in the application of the new statutory standard.

Similarly, none of the authorities upon which respondents rely support their position. *Rogers* v. *Lodge* was decided under the Fourteenth Amendment intent standard, rather than the new Section 2 "results" test. Contrary to respondents' argument (Brief, p. 10), *Rogers* does not hold that all of the trial court's rulings involve "pure questions of fact" governed by Rule 52(a); just before the passage quoted by respondents (p. 10 n.16) the Court undertook an extensive discussion of the appropriate legal standard and concluded that the District Court applied "the proper legal standard" (458 U.S. at 619-22). The passage quoted from *White* v. *Regester* deferring to the District Court's "intensely local appraisal" (Brief, p. 10) refers to the trial court's findings of fact, not to its legal rulings. Neither does *Velasquez* v. *City of Abilene* hold that the trial court's definition and application of Section

2's evidentiary factors are not subject to plenary appellate review.

Consequently, defendants' argument—and the Court of Appeals' decision—refusing to recognize the distinction between the different standards of review applicable to legal errors and factual errors fundamentally conflicts with controlling decisions of this Court and the legislative history of the 1982 amendment to Section 2 and is not supported by any applicable legal authority.

II. RESPONDENTS' CONTENTION THAT THE COURT OF APPEALS CONSIDERED AND REJECTED PETITIONERS' CLAIMS OF LEGAL ERROR IS INCORRECT.

Respondents' contention that the Court of Appeals considered, but rejected, petitioners' claims that the District Court applied improper legal standards in judging the factual proof in this case (Brief, p. 13) is manifestly incorrect and goes to the heart of this case. How could the Court of Appeals have reviewed petitioners' claimed legal errors in its short 3¼-page opinion when it failed to recognize that any errors of law were presented in the appeal [1] and reviewed all of the District Court's rulings under the Rule 52(a) "clearly erroneous" standard (768 F.2d at 573-76)?

Nowhere is this more evident than on the issue of racially polarized voting; respondents' argument that the District Court employed a proper legal standard in judg-

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[1] Respondents mischaracterize petitioners' arguments before the Fourth Circuit on appeal (Brief, pp. 6-7). Petitioners' contention that the District Court employed improper legal standards in assessing the evidence presented was a primary contention (Brief for Appellants, Herbert M. Collins, et al., 4th Cir., pp. 7, 16, 19-21, 27-30, 30-34, 37, 38-39, 43, 48-49; Reply Brief for Appellants pp. 6-9), as the dissenting opinion demonstrates, 768 F.2d at 578 ("the primary thesis of their appeal is the commission of errors of law.")

ing the evidence (Brief, pp. 13-19) is completely untenable. At trial, petitioners presented extensive evidence, by expert witness testimony and by statistical exhibits, showing a high degree of racially polarized voting in Norfolk City Council elections. This proof was essentially admitted to be correct by respondents (see Petition, p. 4); in their brief in the Court of Appeals respondents conceded: "The problem, however, was not so much with appellants' statistics as with the interpretation of those numbers" (Brief for Appellees, City of Norfolk, et al., p. 32). The enclosed tables, which are reproductions of exhibits admitted in evidence at trial, show a highly polarized electorate. Table 1, which shows the votes by

Table 1. Votes by Race of Voters for All Candidates by Race (Exhibit P-179).

Year	% white votes for:		% black votes for:		% of seats contested by blacks
	all whites	all blacks	all whites	all blacks	
1974	99.1	.9	50.5	49.5	75%
1976	91.8	8.2	58.9	41.7	67%
1978	94.0	6.0	67.5	32.5	20%
1980	98.2	1.8	33.0	67.0	67%
1982	89.7	10.3	6.7	93.3	100%
Average	94.6	5.4	43.2	56.8	

race of voters for all white and black candidates, shows that from 1974 to 1982 the percentage of white votes for all white candidates ranged from a low of 89.7 percent to 99.1 percent, with an average for all five elections of 94.6 percent. In contrast, white votes for all black candidates ranged from 0.9 percent to a high of only 10.3 percent, with an average for all five elections of only 5.4 percent of the white votes. Although few white votes went to black candidates, black votes went to both white and black candidates, although a majority of black votes went to black candidates in the last two elections.

Table 2 shows the correlations between the racial composition of the voting precincts (percent white in the voting age population of precincts) and the percentage of the votes for white candidates. On a scale of —1 (high negative correlation) to 0 (no correlation) to +1 (high positive correlation), all the correlations were above .9, "which is considered extremely strong in the social sciences" (Tr. 628, testimony of Kimball Brace).

Table 2. Correlations Between Percentage of Voting Age Population That Is White and Percentage of Votes for All White Candidates for City Council (Exhibit P-180).

Year	r	r^2
1974	.960	.921
1976	.978	.956
1978	.936	.876
1980	.981	.962
1982	.990	.980

Table 3 reports the regression analysis statistics for individual candidates and shows all of the candidates for city council seats (1974-1982) who were supported by more than 50 percent of the white voters. These figures

Table 3. White-Preferred Candidates, in Order of Percent White Support (Over 50 Percent) (Exhibit P-181).

Name	Race	Year	Elected?	White %	Black %
Staylor	W	82	E	82.1%	0.0%
Phillips	W	76	E	81.6%	0.0%
Thomas	W	76	E	81.0%	0.0%
Andrews	W	82	E	79.5%	0.8%
Summers	W	82	E	76.9%	0.0%
Staylor	W	78	E	73.7%	0.0%
Andrews	W	78	E	72.7%	35.4%
Thomas	W	80	E	71.2%	0.0%
Summers	W	78	E	68.2%	0.0%
Leafe	W	80	E	66.5%	0.0%
Staylor	W	74	E	66.0%	56.5%
Andrews	W	74	E	65.0%	9.4%
Middleton	W	78		64.4%	0.0%
Phillips	W	80		56.4%	0.0%
Summers	W	74	E	53.4%	4.1%
Total (15)	100% W		13/15 (86.7%)		
Average				70.6%	7.1%

demonstrate dramatically that, by and large, whites and blacks preferred different candidates for the Norfolk City Council. All of the candidates who were supported by more than 50 percent of the white voters were white, and all but four of them received few, if any, black votes. Only one white-preferred candidate, Claude Staylor in the 1974 election, got more than 50 percent of the black vote, but he lost his black support in subsequent elections (1982 and 1978) and was reelected with no black support. Almost all of the candidates who got more than 50 percent of the white vote were elected (only two of the 15 were defeated).

Table 4 lists all the candidates who were supported by more than 50 percent of the black voters. The statistics on this table show that the city council candidates who were most preferred by the black voters all received low percentages of white votes (except Staylor in 1974). The highest level of white cross-over voting for a black candidate was only 26.5 percent for Green in 1978 (respondents' figures calculated by a different method say 32.2 percent, but the difference is inconsequential).

Table 4. Black-Preferred Candidates, in Order of Percent Black Support (Over 50 Percent) (Exhibit P-184).

Name	Race	Year	Elected?	White %	Black %
Green	B	78	E	26.5%	100.0%
Jordan	B	76	E	20.3%	100.0%
Butts	B	80		5.5%	100.0%
Butts	B	82		6.4%	93.1%
Green	B	82	E	25.6%	92.0%
Bond	B	74		2.0%	82.5%
Hill	W	76		20.4%	80.5%
Hurst	W	76		22.4%	79.9%
Howell	W	80	E	33.5%	73.8%
Howell	W	78	E	27.3%	71.5%
Howell	W	74	E	33.2%	65.3%
Staylor	W	74	E	66.0%	56.5%
Total (12)	6W, 6B	7/12 (58.3%)			
Average				24.1%	82.9%

The figures on Table 3 show that under Norfolk's at-large election system, white voters can elect candidates of

their choice to the city council without any need for black support. In contrast, and contrary to respondents' assertion in their Brief (p. 5), the figures on Table 4 show that with at-large voting, black voters, by themselves, cannot elect any candidates—between 1974 and 1982 five candidates, black and white, who received 80 percent or more of the black vote were defeated (in the 1984 election, held after the case was tried and which is not on this table, Mrs. Butts got the votes of 75 percent of the black voters and lost).[2] In the three instances in which black candidates were elected, they won only because of the white votes which they received.

Altogether, these statistics show that black voters of Norfolk, in the words of Section 2, "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (42 U.S.C. § 1973(b)).

Despite this proof, the District Court concluded that "voting in Norfolk City Council elections is not racially polarized" (605 F. Supp. at 389). This conclusion was based on the District Court's definition of racially polarized voting, which required proof not only of voting patterns, but also of "white backlash" and "whites attempt to limit the field of candidates" (*id.* at 386).[3] Although

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[2] Respondents in their Brief assert that the Concerned Citizens of Norfolk, a black political group, play a "crucial role" in Norfolk politics. Yet the group was unsuccessful in three separate city council elections (1980, 1982, and 1984) in getting its co-chair, Mrs. Evelyn T. Butts (Brief in Opposition, p. 3 n.5), elected to the Norfolk City Council, which belies respondents' assertions that the group plays a "crucial role" and "wields considerable clout" (Brief, p. 3).

[3] The District Court also distorts the testimony of Dr. Timothy O'Rourke, respondents' expert witness, on this issue. Dr. O'Rourke merely "suggested that three factors must be examined" (605 F. Supp. at 386); the District Court itself translated Dr. O'Rourke's suggestion into "Dr. O'Rourke's definition in determining whether the Norfolk City Council elections may be characterized as racially polarized" (*id.*).

petitioners in their Fourth Circuit appeal contended that this definition is contrary to precedent and engrafted onto the accepted definition of racially polarized voting the need to produce proof of an intent to abridge minority voting rights (768 F.2d at 578, Butzner, J., dissenting), the Fourth Circuit panel majority inexplicably failed to discuss this issue *at all* in its opinion.

The treatment of the racial bloc voting issue by the lower courts in this case points up the necessity of maintaining the traditional distinction in the standards of appellate review between legal determinations and findings of fact. The District Court's definition of racially polarized voting was essentially a legal determination which it applied to the facts of this case. The Fourth Circuit, by refusing to subject that legal conclusion to plenary appellate review, denied petitioners effective appellate review of the District Court's ruling on this issue.

Respondents in their Brief in Opposition attempt to defend the District Court's ruling with selective citations and quotations from a number of cases (Brief, pp. 17-19), none of which were cited on this issue or discussed by the Court of Appeals or by the District Court. Respondents' reliance on these cases simply emphasizes that the proper definition of racially polarized voting presents an important legal issue which should have been addressed by the Court of Appeals in this case, but was not. Contrary to respondents' assertions, in none of the cases cited were proof of "white backlash" and "whites attempt to limit the field of candidates" considered to be elements of the definition of racially polarized voting. The District Court's definition of racially polarized voting is erroneous as a matter of law and should be reversed.

CONCLUSION

For the above-stated reasons, and for the reasons stated in the Petition for a Writ of Certiorari, this Court should grant the writ to review the decision below or, alternatively, defer ruling on this Petition pending a decision in *Thornburg* v. *Gingles*, No. 83-1968.

Respectfully submitted,

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